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In the Supreme Court of the United States
October Term, 1964

[redacted], PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 338

RENEE BINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App., R. 673-678) is reported at 331 F. 2d 390.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1964. A petition for rehearing was denied on July 2, 1964. The petition for a writ of certiorari was filed on July 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the verdict.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a trial by jury, petitioner—a Miami real estate agent—was convicted in the United States District Court for the Southern District of Florida on three counts charging her with making false statements and concealing facts from the Federal Housing Administration (R. 48-49). Petitioner was sentenced to imprisonment for ten days, and a probationary period of one year (R. 54-55). The court of appeals affirmed the conviction under the third count of the indictment, reversing as to the first and second counts (R. 679).

The third count charged that petitioner, by trick, scheme or device, concealed from the Federal Housing Administration the fact that she loaned $300 to a

Daniel McPhaul "for the purpose of enabling him to complete the purchase of certain property upon which a mortgage loan was made * * * which loan was offered to the Federal Housing Administration for insurance" (R. 4).

The record shows that petitioner loaned $300 to McPhaul (R. 483); that McPhaul needed the money because the real estate purchase was going to deplete his financial resources (R. 239, 270-271, 278); that the loan was in the form of a check dated February 7, 1961—the date of the closing; and that the check was given to the seller at the closing as part payment for the real estate (R. 213, 215, 239-240, 244). The F.H.A. administration requires a purchaser to certify, at the time of closing, that he has not obligated himself in connection with the purchase of property (R. 91, 97). If the housing administration had been informed that the purchaser had borrowed funds to close the transaction, it would have refused to assume the obligation that it did (R. 97-98).

ARGUMENT

Petitioner does not contest the fact that her firm loaned McPhaul $300 and that a check for that amount was turned over at the closing to the seller of the house. Nevertheless, she contends that the evidence was insufficient, on the ground that the government failed to show that McPhaul lacked sufficient money for the closing apart from the $300 loan (Pet. 6). In this connection, petitioner points to various statements by McPhaul on direct examination to the

effect that he had sufficient funds to complete the closing without the loan.

The Government was not, however, required to prove that the loan had to be made in order to enable McPhaul to complete the purchase. The Government had only to prove that the $300 was loaned to McPhaul for the real estate closing, as charged in the indictment. This the evidence, as summarized above, clearly established.

McPhaul's testimony as to the purpose of the loan was confused. But this was because McPhaul—a totally uneducated Negro (R. 257)—had been told repeatedly by petitioner (at the time the loan was made and again a few days before the trial) that the purpose of the loan was "personal" (R. 247-252), and because McPhaul had promised petitioner not to say that the check was for the closing (R. 250). The jury had before it all the facts and circumstances and was not bound by McPhaul's understanding of the transaction. The jury was instructed that it could not convict unless it found that the money was loaned for the closing (R. 574-575). There is no reason for this Court to review the jury's finding, sustained by the court of appeals, that petitioner made the loan for the described purpose.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DAVID N. ELLENHORN,
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SEPTEMBER 1964

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REPLY BRIEF FOR THE PETITIONER

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JOHN F. DAVIS, CLERK

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix to the Petition, p. 1, is reported at 331 F. 2d 390. Petition for rehearing was denied by per curiam order without opinion, which order is set out in the Appendix to the Petition, p. 6. The District Court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1964. A petition for rehearing was denied on July 2, 1964. The petition for a writ of certiorari was filed on July 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

MUST A MOTION FOR JUDGMENT OF ACQUITTAL BE GRANTED WHEN ALL OF THE EVIDENCE AND TESTIMONY NEGATIVES AN ESSENTIAL ELEMENT OF THE CRIME CHARGED?

Or, otherwise stated,

MAY A CRIMINAL CONVICTION BE SUSTAINED ON THE THEORY THAT THE JURY MIGHT DISBELIEVE ALL THE TESTIMONY AS TO AN ESSENTIAL ELEMENT OF THE CRIME AND FIND THE NEGATIVE OF THAT TESTIMONY TO BE TRUE?

STATEMENT

In the brief for the United States in opposition received by petitioner's counsel on September 22, 1964, there is an important inaccuracy in the Government's argument, which appears on page 4, to-wit:

> "The government was not, however, required to prove that the loan had to be made in order to enable McPhaul to complete the purchase."

ARGUMENT

With respect to this inaccuracy, petitioner respectfully directs the attention of the Court to paragraph 3 of the motion for bill of particulars (R. 20, 21), wherein the petitioner and her co-defendant moved that the Government be required to furnish a bill of particulars answering, among other things, the following:

> "3. With respect to Count Three, state whether the alleged loan of $300.00 was allegedly made for the purpose of providing the said Daniel McPhaul with the funds necessary to close or for other purpose; if for other purpose, state that purpose."

On this motion a hearing was had and an order entered by United States District Judge Emett C. Choate, the pertinent part of which appears at R. 34, to-wit:

> "ORDERED and ADJUDGED as follows:
>
> "1. That the motion for bill of particulars be and the same is hereby denied except for paragraph No. 3 thereof which is hereby granted, and the government is required to file its bill of particulars stating, with respect to Count Three of the indictment, whether the alleged loan of $300.00 described therein, was allegedly made for the purpose of providing the said Daniel McPhaul with the funds necessary to close or for other purpose, and if for another purpose, to state that purpose."

At the close of the Government's case, petitioner's attorney in arguing for an acquittal on Count Three said (R. 339):

> "As to Count Three, Blanche Ressa and Renee Bins are charged, 'For the purpose of influencing the action of the Federal Housing Administration, did wilfully and knowingly conceal from the Federal Housing Administration, and cover up by (267) a scheme and device, material facts, to-wit, that Daniel McPhaul was about to become, and did become indebted to Blanche Ressa and Renee Bins doing business as Seventh Avenue Realty, Miami, Florida, in the amount of $300.00 which said sum was loaned to him by Blanche Ressa and Renee Bins doing business as Seventh Avenue Realty for the purpose of enabling him to complete the purchase of certain property,' *as augmented by the Bill of Particulars stated in the record which the Government said that they meant that this money was borrowed as part of the cash to close the transaction.*" (Emphasis supplied.)

At the close of all of the evidence, Assistant United States Attorney Daniel S. Pearson made a statement to the jury in keeping with the bill of particulars as follows, referring to defendant's Exhibit No. 6, the $300.00 check which petitioner and her partner had given to McPhaul:

> "The only question here is what was it for. Was it for the closing? Or was it for personal needs?"

While the transcript of record does not contain the statement made by the Government attorney at the commencement of the trial in response to Judge Choate's order requiring particulars as to the $300.00 check in question and its relationship to the closing, as aforesaid, everything in the record indicates that such a statement was made and the Government has accepted this as a fact and is certainly estopped from denying it.

In order that there be no question on this point, we feel that it is appropriate to quote from the brief of the appellant filed in the United States Court of Appeals for the Fifth Circuit and the brief of appellee in response thereto. In the statement of the case in the brief of appellant (petitioner herein) on page 6, we have the following statement:

> "With respect to Count Three, the government, at the commencement of the trial, filed a Bill of Particulars in which it specified that the alleged $300.00 loan referred to in Count Three was made for the purpose of providing Daniel McPhaul with funds necessary to close (R. 34, 339, 532, 547, 574-575)."

In the statement of the case in the brief of the appellee (respondent herein) the following statement is made at page 1:

> "Appellee accepts appellant's 'statement of the case',***."

It would appear that the Government's brief in opposition is indulging in semantics when the statement is

made that "The Government was not, however, required to prove that the loan had to be made in order to enable McPhaul to complete the purchase. The Government had only to prove that the $300.00 was loaned to McPhaul for the real estate closing, as charged in the indictment." This is only hair-splitting and does not conform to the statement of the Assistant United States Attorney who tried the case to the effect that the question was: Was it used for closing or for personal needs? (R. 547).

As is pointed out on page 6 of the petition, the only witness for the prosecution on this question was Daniel McPhaul himself, who unequivocally testified that he did not need the money to close (R. 240). This was stated again by McPhaul under cross-examination (R. 270, 277.)

The Government in its brief in opposition on page 4 refers to the fact that McPhaul was "a totally uneducated Negro (R. 257)", because McPhaul stated he had no formal education. The Government states that "McPhaul's testimony as to the purpose of the loan was confused". While this may be a conclusion reached by the drafters of the Government's brief, it is not supported in the record. In fact McPhaul testified (R. 235) as follows in response to questions by the Assistant United States Attorney as indicated.

"Q. Mr. McPhaul, you didn't borrow any money at the time of the closing?

"A. Yes, sir, I did.

"MR. BOOTH:

"I object.

"THE WITNESS:

"Not at the time of the closing. I mean, I borrowed money to make the closing. I beg your pardon.

"BY MR. PEARSON:

"Q. When did you do that?
"A. I got it from my boss man before I got ready to go down there.

"Q. From whom?
"A. My boss man.

"Q. Who is that?
"A. Out at Eastern Airlines.

"Q. Did you borrow from anybody else?
"A. Not for no closing."

It is quite apparent that despite the lack of formal education Mr. McPhaul knew what he was borrowing, from whom and what for.

Witness McPhaul explained that he required the additional money which he borrowed from the petitioner and her partner to furnish the house which he was buying (R. 262). He also explained that an unanticipated delay developed in delivering possession of the property he was buying, and he discovered that he would have to pay rent at his old quarters between the time of closing and the time of delivery of possession of the new house (R. 270, 271).

No contradictory evidence was introduced by any other Government witness and thus, at the close of the Government's case in chief, the Government's lone witness on Count Three had given testimony that completely exonerated the appellant. No defense witness or rebuttal witness testified on this subject except in corroboration of McPhaul's testimony quoted above.

At the close of all the evidence, it was clear that not one iota of testimony had been adduced by the Government tending to show that the $300.00 loan to McPhaul had been needed by him for the closing.

The only way in which the jury could possibly have convicted the petitioner on Count Three was to have disbelieved the testimony of all the witnesses, both Government and defense, and it is respectfully submitted that a criminal conviction cannot rest entirely on disbelief of all the testimony in the case relating to Count Three. It is difficult to believe that in the Federal court system a person can be convicted on evidence that is completely against the charge.

CONCLUSION

It is therefore respectfully submitted that a writ should be granted and that petitioner's case should be heard.

RICHARD R. BOOTH and
WALTERS, MOORE & COSTANZO
1008 Ainsley Building
Miami, Florida 33132
Attorneys for Petitioner

By _____
Richard R. Booth

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing petition were served on each of the following this _____ day of September, 1964, in the manner indicated: United States Attorney, Miami, Florida, by regular mail, postage prepaid; Solicitor General, United States Department of Justice, Washington, D. C. 20530, by United States Air Mail, postage prepaid.

_____
Richard R. Booth